

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Federal-State Joint Board on
Universal Service

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CC Docket No. 96-45

COMMENTS OF PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
ON PETITIONS FOR RECONSIDERATION

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**COMMENTS OF PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
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The Personal Communications Industry Association ("PCIA")¹ hereby submits its comments on the petitions for reconsideration of the Commission's *Report and Order* in the above-captioned proceeding.² The Commission should adopt several changes suggested by the petitions in order to make administration of the universal service fund more equitable as applied to commercial mobile radio service ("CMRS") operators and more consistent with the provisions of the Telecommunications Act of 1996. At the same time, some proposals set forth by

¹ PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private Systems Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

² FCC 97-157 (May 8, 1997) ("*Report and Order*"), *Errata*, FCC 97-157 (June 4, 1997), *Order on Reconsideration*, FCC 87-246 (July 10, 1997), *Erratum*, FCC 97-246 (July 15, 1997). The *Report and Order* was summarized in the Federal Register on June 17, 1997, 62 Fed. Reg. 32862. The petitions for reconsideration were listed in the Federal Register on August 1, 1997, 62 Fed. Reg. 41386.

petitioners should be rejected because they are contrary to the public interest and to the even-handed application of the universal service policies.

I. SUMMARY

The petitions before the Commission raise a number of issues that warrant reconsideration of the *Report and Order*. First, PCIA agrees that the Commission must review its finding concerning the obligation of CMRS carriers to contribute to state universal service plans prior to CMRS becoming a substitute for local exchange service for a substantial portion of the communications within a state. The Commission has ignored the clear language of Section 332(c)(3) of the Communications Act in reaching its conclusion. In fact, at the present time, in light of the statutory direction in Section 332(c)(3), no CMRS provider may be required to contribute to a state universal service fund.

Second, petitions filed by other parties reiterate PCIA's demonstration in its own petition that the Commission has full authority under the Communications Act to reduce the level of universal service contribution to be collected from CMRS operators. In light of the fact that paging companies may not receive universal service fund disbursements, requiring them to make contributions at the same rate as carriers that are eligible to receive universal service support is not equitable and is discriminatory. As such, the Commission's plan is inconsistent with the requirements of Section 254(d).

Third, because of the difficulties inherent in separating CMRS revenues into interstate and intrastate allocations, it is important for the Commission to adopt procedures to simplify as much as possible that process. PCIA believes that reliance on a TRS-based model would effectively serve this goal. In addition, the Commission should pursue other policies and

approaches to help reduce the expenditure of resources by CMRS carriers in determining the jurisdictional allocations.

Fourth, the Commission must ensure that carriers retain the ability to recover required universal service contribution amounts. The nature of such recovery should be at the discretion of the carrier, and might include end user pass-through charges or increases in service rates.

Fifth, the Commission properly adopted the competitive neutrality principle. Moreover, in applying the seven principles in structuring the universal service program, the Commission has not favored wireless carriers. Indeed, if anything, the Commission should take steps to ensure that states do not undercut the competitive neutrality principle by imposing requirements that effectively foreclose participation by CMRS carriers in universal service support programs.

II. PCIA CONCURS WITH PETITIONERS THAT THE COMMISSION'S CONCLUSION CONCERNING THE OBLIGATION OF CMRS PROVIDERS TO CONTRIBUTE TO STATE UNIVERSAL SERVICE FUNDS IS INCONSISTENT WITH THE CLEAR LANGUAGE OF THE STATUTE

AirTouch Communications, Inc. ("AirTouch"), Nextel Communications, Inc. ("Nextel"), and ProNet Inc. ("ProNet") have requested the Commission to reconsider its determination that "section 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state support mechanisms."³ PCIA endorses their request for reconsideration, since the Commission's interpretation is clearly at odds with the statutory language of Section 332(c)(3). Specifically,

³ *Report and Order*, ¶ 791. See AirTouch Communications, Inc. Petition for Clarification and Partial Reconsideration at 12-16 (filed July 17, 1997) ("AirTouch Petition"); Petition for Reconsideration of Nextel Communications, Inc. at 1-18, 20-21 (filed July 17, 1997) ("Nextel Petition"); ProNet Inc. Petition for Reconsideration at 9-13 (filed July 17, 1997) ("ProNet Petition").

under this section, until CMRS is a substitute for landline telephone exchange service for a substantial portion of the communications within a particular state, that state may not require CMRS providers to contribute to the state universal service fund.

The Commission apparently reached its conclusion on the basis of the following factors. First, Section 254(f) allows states to require "every carrier that provides intrastate telecommunications services" to "contribute, on an equitable and nondiscriminatory basis...to the preservation and advancement of universal service in that state." Second, the Joint Board reached the same conclusion in its recommendation.⁴ Third, the California Public Utilities Commission ("CPUC") requires CMRS providers in California to contribute to the state's programs for Lifeline and high cost small companies.

As Nextel and ProNet have pointed out, the Commission provided no explanation, reasoning, or analysis to support its decision.⁵ Rather, without responding to the arguments before it, the Commission simply dismissed claims that Section 332(c)(3)(A) "prohibits states from requiring CMRS providers operating within a state to contribute to state universal service programs unless the CMRS provider's service is a substitute for landline service in a substantial portion of the state."⁶ As described in the AirTouch, Nextel and ProNet Petitions and below, the Commission's conclusion is inconsistent with the plain language and legislative history of Sections 254 and Section 332(c).

⁴ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87, 484 (1996) (Recommended Decision).

⁵ Nextel Petition at 10; ProNet Petition at 11.

⁶ *Report and Order*, ¶ 791.

The clear language of Section 332(c)(3)(A) indicates that states cannot require CMRS providers to contribute to their intrastate universal service funds unless CMRS is used as a substitute for landline local exchange service for a "substantial portion" of the state's communications:

Nothing in this subparagraph shall exempt providers of commercial mobile services (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State*) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.⁷

The enactment of Section 254, in and of itself, does not serve to repeal this portion of Section 332(c), given that it is "a cardinal principle of statutory construction that repeals by implication are not favored,"⁸ and "courts will not find repeals by implication unless legislative intent to repeal is 'clear and manifest.'"⁹ Thus, because nothing in the text or legislative history of Section 254 indicates an intent to repeal Section 332(c), courts will not — and the Commission should not — presuppose such a repeal.¹⁰

⁷ 47 U.S.C. § 332(c)(3)(A) (emphasis added).

⁸ *Radzanower v. Touche Ross and Co.*, 426 U.S. 148, 154 (1976).

⁹ *Independent Community Bankers Ass'n of South Dakota, Inc. v. Board of Governors of the Federal Reserve System*, 820 F.2d 428, 438 (D.C. Cir. 1987) (quoting *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 1262 (1986)), *cert. denied*, 484 U.S. 1004 (1988).

¹⁰ Moreover, the Telecommunications Act of 1996 itself confirms this conclusion. Section 601(c)(1) of the 1996 Act states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless *expressly* so provided in Such Act or amendments." Telecommunications Act of 1996, Pub. L. 104-104, § 601(c)(1), 110 Stat. 56, 143 (1996) (emphasis added). As AirTouch points out, "[n]othing in
(Continued...)

This conclusion is supported by the decision in *Metro Mobile CTS of Fairfield County v. Connecticut Department of Public Utility Control*,¹¹ in which the court held that even after the enactment of Section 254(f), Section 332(c)(3)(A) prohibits the state of Connecticut from requiring cellular providers "to make payments toward the funding of a Universal Service Program."¹² In reaching this legal conclusion, the court noted that Section 332(c)(3)(A) consists of two distinct clauses; a clause that preempts states from regulating CMRS rates and market entry,¹³ and a clause that "expressly exempts from preemption any assessments for universal and affordable service where cellular service is a significant substitute for land line service."¹⁴ Applying the rule of statutory construction "requir[ing] that no language in a statute be read to be redundant,"¹⁵ the court concluded that:

(...Continued)

the 1996 Act, including Section 254, 'expressly' modifies, impairs, or supersedes Section 332(c)(3)." AirTouch Petition at 16 (emphasis added). *See also* ProNet Petition at 12.

¹¹ No. CV-95-0551275S (Conn. Super. Ct. Dec. 9, 1996) ("*Metro Mobile CTS*"). The Commission, without analysis, rejected the logic of the Connecticut court. *See Report and Order*, ¶ 791.

¹² *Metro Mobile CTS*, slip op. at 3.

¹³ *Id.* at 7 (discussing the portion of Section 332(c)(3)(A) providing that "[n]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services").

¹⁴ *Id.* (discussing the portion of Section 332(c)(3)(A) providing that "[n]othing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state) from requirements imposed by a state commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates").

¹⁵ *Id.*

[b]y expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that *cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption*.¹⁶

Thus, the court found, cellular providers are not required to contribute to Connecticut's universal service fund.¹⁷

Although the federal district court for the district of Kansas, in *Mountain Solutions, Inc. v. State Corporation Commission of the State of Kansas*,¹⁸ reached an opposite conclusion from that of the Connecticut court, the Kansas court's holding is based on an illogical reading of Section 332(c)(3)(A). Specifically, the Kansas court read the second sentence of this section¹⁹ to serve as an exception to the prohibition against state-imposed CMRS rate regulation contained in the first sentence:²⁰

The universal service language contained in the second sentence of section 332(c)(3)(A) merely clarifies that states wishing to ensure the universal availability of affordable telecommunications services may regulate the *rates and market entry* of commercial mobile service providers if certain preconditions are satisfied.

¹⁶ *Id.* (emphasis added).

¹⁷ The Court's analysis applies equally to all other subsets of CMRS.

¹⁸ Civil Action No. 97-2116-GTV (D. Kan. May 23, 1997) ("*Mountain Solutions*").

¹⁹ "Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."

²⁰ "[N]o state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service...except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

Nothing in that sentence indicates any intent to prevent states from attempting to guarantee universal availability of telecommunications through means other than *rate or market entry regulation*.²¹

This interpretation is illogical for two reasons. First, it flies in the face of the plain language of the second sentence, which exempts CMRS providers from state-imposed universal service requirements, *unless* the CMRS provider serves as a substitute for landline service for a "substantial portion" of the state's communications. Second, the Kansas court's interpretation of the second sentence would render the third sentence redundant,²² as it is the *third sentence* that allows states to "regulate the *rates*...of commercial mobile service providers if certain preconditions are satisfied."²³

Further, the Commission's reliance on the CPUC decision that CMRS providers must contribute to California's intrastate universal service fund is not well-founded. The CPUC decision lacks conclusive value because it was not accompanied by any analysis of the universal service portions of Section 332(c)(3). In fact, the CPUC merely concluded that, because "application of a surcharge to the widest possible customer base is fairer to all competitors than a narrowly applied surcharge" and "[a]ll end-users of every LEC, IEC, cellular and paging

²¹ *Mountain Solutions*, slip op. at 10 (emphasis in original).

²² "Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service, and the Commission shall grant such petition if such State demonstrates that — (i) market conditions with respect to such services fail to protect subscribers adequately from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state."

²³ *Mountain Solutions*, slip op. at 10. AirTouch also concurs in this assessment of the *Mountain Solutions* reasoning. AirTouch Petition at 14 n.33.

company in the state ... receive value from the interconnection of end-users to the switched network," CMRS providers are required to contribute to the intrastate fund.²⁴ The CPUC decision does not even consider the gravamen of the CMRS carriers' position that states are legally barred by Section 332(c)(3)(A) from requiring CMRS providers to contribute to intrastate universal service funds, and thus cannot be relied upon to support the Commission's erroneous determination.

Thus, given the text and legislative history of Sections 254 and 332(c), CMRS providers may not be required to contribute to state universal service funds. As AirTouch has pointed out, the Commission only very recently reported that CMRS is in fact not a substitute for landline exchange service.²⁵ Accordingly, the Commission must reconsider and reverse its determination that states are not precluded from imposing intrastate universal service support obligations on CMRS providers. Rather, at present, because CMRS is not a substitute for landline local exchange telephone service for a substantial portion of the communications within any state, no state may require a CMRS provider to contribute to a state universal service fund.

If, however, the Commission declines to adopt this approach, some mechanism must be developed to ensure that CMRS operators are not subject to conflicting federal and state contribution requirements based on counting the same retail revenue base for assessing the fees due. That is, CMRS providers should not be required to contribute to both the federal and state

²⁴ *Alternative Regulatory Frameworks For Local Exchange Carriers*, Decision 94-09-065, 56 CPUC.2d 117, 289-290 (1994). The CPUC, citing Decision 94-09-065, repeated this conclusory statement in its most recent universal service order. *Rulemaking on the Commission's Own Motion Into Universal Service*, Decision 96-10-066, at 45-46 (Oct. 25, 1996).

²⁵ AirTouch Petition at 13 (citing *Competition in the Commercial Mobile Radio Services, Second Annual Report*, 7 Comm. Reg. (P&F) 31-33, text accompanying nn. 247-259 (1997)).

funds based on their entire revenue base or network structure. At present, CMRS licensees do not separate their costs and revenues on an interstate/intrastate basis, and in many cases there is no practical way to do so. Thus, some method must be prescribed in order to prevent such an overlapping assessment of fees. Moreover, any mechanism adopted by the Commission must ensure that state universal service support charges imposed on CMRS operators do not effectively bar entry into the CMRS marketplace or amount to rate regulation of CMRS offerings.²⁶

III. PCIA ENDORSES THE COMMENTS OF THOSE PETITIONERS THAT CONCUR WITH PCIA THAT IT IS NEITHER “EQUITABLE” NOR “NON-DISCRIMINATORY” FOR THE COMMISSION TO REQUIRE MESSAGING PROVIDERS TO CONTRIBUTE TO THE UNIVERSAL SERVICE FUND

In its own petition for partial reconsideration and clarification in this docket, PCIA sought reconsideration of the Commission’s decision to require paging carriers to contribute to the federal universal service fund on the same basis as “eligible telecommunications carriers.”²⁷ PCIA demonstrated that it was neither equitable nor non-discriminatory, as required by Section 254(d), to require messaging providers to contribute on the same basis as all other telecommunications carriers to the universal service fund, and that the Commission had authority to reduce the proportion paid by paging carriers. Accordingly, PCIA requested that the Commission reduce by 50 percent the amount paging carriers otherwise would be required to contribute to the federal universal service fund.

²⁶ See Nextel Petition at 18-20.

²⁷ Personal Communications Industry Association Petition for Partial Reconsideration and Clarification at 2-8 (filed July 17, 1997) (“PCIA Petition”).

PCIA was joined in seeking relief by Ozark Telecom, Inc. (“Ozark”), ProNet, and Teletouch Licenses, Inc. (“Teletouch”).²⁸ Like PCIA, these petitioners agreed that the Commission does in fact have the authority under Section 254(d) to reduce the amount to be contributed by paging carriers into the universal service fund. The petitioners rely upon the plain language of Section 254(d) — which remains uncontradicted by anything relied upon by the Commission in the *Report and Order* — to confirm that the Commission can in fact take into account the inequitable and discriminatory effect of the Commission’s requirement for full contributions by paging carriers when they are incapable of receiving any support from the federal universal service fund. ProNet also points out that “the contribution and support provisions of the [*Report and Order*] fail the competitive neutrality standards.”²⁹

Ozark, ProNet, and Teletouch have provided further demonstration, consistent with PCIA’s showing, of the nature of the inequitable and discriminatory effect of the Commission’s requirement that paging carriers contribute on the same basis as all other providers of telecommunications services. Ozark points out that “paging carriers’ forced ‘contributions’ will subsidize services provided by the two-way telephone industry, which is in direct competition with the paging industry,” and thus “provides an advantage for telephone providers.”³⁰ ProNet

²⁸ See Ozark Telecom, Inc. Petition for Reconsideration at 1-9 (filed July 17, 1997) (“Ozark Petition”); ProNet Petition at 2-9; Teletouch Licenses, Inc. Petition for Reconsideration at 1-8 (filed July 17, 1997) (“Teletouch Petition”).

²⁹ ProNet Petition at 4. See also Ozark Petition at 4.

³⁰ Ozark Petition at 4.

also notes the discriminatory effect of the Commission's plan, indicating that paging carriers in effect will be subsidizing their competitors.³¹

Finally, the petitioning parties addressing the level of contributions to be made by paging carriers provide additional evidence of the adverse effect of the Commission's action on the price of paging services, the providers of paging services, and the public. Ozark indicates that it currently provides paging services to low income consumers and unemployed individuals at a flat fee of only \$3.00 per month.³² Such a service appears to further the Congressional and Commission goals of promoting universal access to telecommunications services, but the rate is one that permits Ozark barely to "break even."³³ According to Ozark, its payments into the universal service fund under the Commission's current plan would cause it to lose money on each such subscriber. Alternatively, if the universal service contribution amount is passed onto the subscribers, many of them simply would discontinue service. PCIA agrees that either result is inconsistent with the objectives of Section 254 and the Commission's efforts to implement the universal service policies, as well as the public interest.

ProNet highlights the fact that the paging industry already is characterized by intense price competition.³⁴ As a result, ProNet points out that "mandatory contributions will amount to a far greater percent of paging carriers' profit margins and, if passed on to end users as

³¹ ProNet Petition at 4 and n.8.

³² Ozark Petition at 7.

³³ *Id.*

³⁴ ProNet Petition at 5.

contemplated by the [*Report and Order*], of their subscribers' rates."³⁵ Compared to other service providers, paging carriers have less ability "to pass the costs of universal service contributions to their subscribers without depressing demand and diminishing their subscriber base."³⁶ Teletouch indicates that the universal service contribution requirement now imposed by the Commission "will make it difficult for paging carriers in most major markets to retain enough capital to improve their service offerings."³⁷

Thus, the petitions filed by Ozark, ProNet, and Teletouch underscore the fact that the Commission is required to reconsider its decision to impose full funding obligations upon paging carriers, despite their ineligibility to receive disbursements from the universal service fund.

IV. PCIA SUPPORTS REQUESTS THAT THE COMMISSION ADOPT A SIMPLIFIED METHOD FOR CALCULATING THE AMOUNTS TO BE PAID BY CMRS LICENSEES INTO THE UNIVERSAL SERVICE FUND

AirTouch has noted that the Commission's *Report and Order* did not "specifically address how ... CMRS providers ... are to allocate their end-user telecommunications services revenues between jurisdictions."³⁸ AirTouch further correctly indicates that there is no ready means for CMRS providers to allocate their revenues between the interstate and intrastate jurisdictions.³⁹ In order to simplify the process for CMRS licensees and to minimize their

³⁵ *Id.*

³⁶ *Id.*

³⁷ Teletouch Petition at 6-7.

³⁸ AirTouch Petition at 10.

³⁹ *Id.* at 11. *See also* Petition for Reconsideration and Clarification of the Cellular Telecommunications Industry Association at 12-18 (filed July 17, 1997) ("CTIA Petition").

administrative costs, AirTouch requests the Commission “to confirm that CMRS providers may use their TRS procedures and results in calculating the revenue which they must report for the universal service programs.”⁴⁰

PCIA concurs that it is critical for the Commission to adopt policies and procedures that may be simply and directly applied by CMRS carriers in order to determine the allocation of revenues to the interstate jurisdiction as required in connection with calculating contributions to the high cost/low income universal service fund. As frequently pointed out by PCIA, there are many difficulties inherent in determining whether CMRS traffic is interstate or intrastate. Without guidance from the Commission to simplify the process, there is a risk that the costs of calculating the jurisdictional allocations will outstrip the level of contributions to be made by CMRS carriers to the universal service fund.

In that regard, PCIA finds merit in the recommendation to permit CMRS carriers to use a model based on the current telecommunications relay services process. Somewhat similarly to universal service (excluding the schools and libraries and rural health care providers funds), contributions to the TRS program are based on a carrier’s share of gross *interstate* services revenues.⁴¹ Because the TRS model is based on gross revenues instead of end user revenues, however, certain further calculations would need to be made to determine the appropriate amount subject to universal service contribution. As suggested by AirTouch, CMRS providers could

⁴⁰ AirTouch Petition at 10. *See also* CTIA Petition at 20-23.

⁴¹ *See* 47 C.F.R. § 64.604(c)(4)(iii)(A).

“use their TRS calculations and then subtract out their wholesale (or non-end-user) telecommunications and other non-telecommunications service revenue.”⁴²

In addition to permitting use of a model based on the TRS program, PCIA urges the Commission to adopt other steps to simplify the allocation process for all CMRS entities, but particularly smaller carriers. The Commission staff has been working with PCIA and other representatives and members of the CMRS industry in order to understand better the issues involved in attempting to allocate CMRS revenues between the interstate and intrastate jurisdictions. During that process, PCIA and others have made suggestions to the Commission for ensuring that the universal service funding process is made as low cost and efficient as possible for the wireless industry. The Commission should implement as many steps as possible that will help to obtain this goal in the context of universal service fund administration.

V. CARRIERS MUST BE ABLE TO RECOVER THE AMOUNTS TO BE COLLECTED FOR THE UNIVERSAL SERVICE FUND

The Commission has made clear that carriers may recover the amounts to be contributed to the universal service fund from their subscribers, and that the carriers have the flexibility to decide the best way to implement such recovery.⁴³ Two petitioners have challenged the Commission’s conclusion, in that context, that the imposition of universal service funding requirements warrants permitting carriers to make adjustments in long term contracts.⁴⁴

⁴² AirTouch Petition at 12.

⁴³ *Report and Order*, ¶¶ 851, 853, 855.

⁴⁴ *Id.*, ¶ 851. See Petition of the Ad Hoc Telecommunications Users Committee for Partial Reconsideration and Clarification of Report and Order at 2-11 (filed July 17, 1997); Limited Petition for Reconsideration of American Petroleum Institute at 3-8 (filed July 16, 1997).

However the Commission responds to the requests for reconsideration concerning long term contracts, it is essential that the Commission do nothing to undercut the ability of carriers — particularly CMRS operators — to recover their universal service contribution amounts from subscribers. The Commission’s decision to permit recovery of universal service charges, in the manner deemed appropriate by the individual carrier, was soundly based on the record before it in this proceeding.

As PCIA pointed out in its comments, if carriers are inhibited by regulatory fiat in their ability to recover the costs of doing business (including universal service contributions), market entry and participation will be discouraged,⁴⁵ contrary to Congressional and Commission objectives. Accordingly, the Commission should take no action to interfere with or alter its determination to permit recovery of universal service contributions through end user pass-through charges, incorporation into service rates, or other mechanism selected by the carrier (otherwise consistent with the Commission’s rules and policies).

VI. THE COMMISSION MUST MAINTAIN COMPETITIVE NEUTRALITY IN THE IMPLEMENTATION AND ADMINISTRATION OF THE UNIVERSAL SERVICE FUND

The Western Alliance alleges that the Commission has improperly adopted “competitive neutrality” as one of the guiding principles for the universal service program, and that the Commission has, under the guise of that principle, unduly favored wireless carriers.⁴⁶

⁴⁵ Comments of the Personal Communications Industry Association, CC Dkt. No. 96-45, at 29 (filed Dec. 19, 1996).

⁴⁶ Western Alliance Petition for Reconsideration at 3-8 (filed July 17, 1997) (“Western Alliance Petition”).

Notwithstanding the claims of the Western Alliance, however, the Commission acted fully consistent with its statutory authority to incorporate the competitive neutrality principle. Moreover, the Commission has not unduly favored wireless carriers, but merely sought to develop a level-playing field to ensure that all carriers have an opportunity to participate in meeting the telecommunications needs of the American public, specifically including rural areas.

Initially, Section 254(b) of the Communications Act of 1934, as amended, identifies six statutory principles to guide the development of the Commission's universal service program. Section 254(b)(7) then specifically authorizes the Commission to base its universal service policies on "[s]uch other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act."⁴⁷ Despite the claims of the Western Alliance, nothing in the plain language of Section 254 prescribes or prohibits what additional principles may be adopted by the Commission, so long as such principles meet the standards enunciated in Section 254(b)(7).

The Western Alliance appears to believe that the competitive neutrality principle adopted by the Commission is somehow weighted in favor of wireless carriers and against rural telephone companies. The definition of the principle, as adopted by the Commission, makes clear that the Western Alliance's perspective is incorrect:

Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules should neither unfairly advantage nor disadvantage one provider over

⁴⁷ 47 U.S.C. § 254(b)(7).

another, and neither unfairly favor nor disfavor one technology over another.⁴⁸

By its definition, the competitive neutrality principle helps to assure that the members of the Western Alliance, as well as all other carriers, including CMRS operators, are neither given special treatment, nor discriminated against. In the past, local telephone companies may not have been concerned with competitors seeking to meet the basic telecommunications needs of their subscribers. The revised universal service program does now, however, present that possibility. While that may not be the preferred outcome of the Western Alliance, it nonetheless is fully consistent with the Telecommunication Act of 1996 as well as the record developed in this proceeding.

The Western Alliance is also incorrect in claiming that the Commission has relied upon the competitive neutrality principle in order to favor wireless carriers. All the Commission has sought to do is to ensure that all interested and qualified carriers have an opportunity to participate in the universal service program. While the Western Alliance may desire to impose requirements to minimize the number of potential competitors for universal service support, that does not mean that their recommendations in fact furthers the public interest.

If anything, the Western Alliance arguments confirm the necessity of granting the relief sought by Sprint Spectrum L.P., d/b/a Sprint PCS (“Sprint PCS”). Sprint PCS requests that “the Commission confirm that states must conduct their intrastate universal service programs in a competitively- and technologically-neutral fashion that gives CMRS providers a full opportunity

⁴⁸ *Report and Order*, ¶ 47.

to participate in those programs.”⁴⁹ Sprint PCS voices concern that efforts will be made to persuade state commissions to impose requirements (such as in the definition of universal service, eligibility qualifications, and support payment calculation methodologies) that will hinder new entrants.⁵⁰ PCIA agrees that the Commission should ensure that its efforts in this docket to promote universal access to telecommunications services on a cost-effective basis while accommodating (and promoting) emerging competition are not undercut by conflicting actions at the state level. On reconsideration, the Commission can simply remind states of their obligations under the Communications Act of 1934 and the terms of the Commission’s *Report and Order*.

⁴⁹ Petition for Clarification of Sprint Spectrum L.P. d/b/a Sprint PCS at 1 (filed July 17, 1997) (“Sprint PCS Petition”).

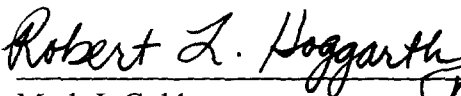

⁵⁰ *Id.* at 2-3.

VII. CONCLUSION

For the reasons stated above, the Commission should act to review in part its *Report and Order* and accompanying rules. Action consistent with these comments will help to promote the public interest and more effectively achieve the statutory goals.

Respectfully submitted,

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August 18, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 1997, I caused copies of the foregoing
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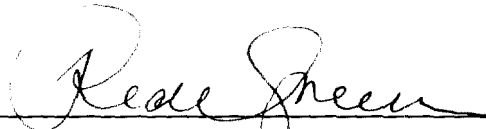
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